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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/641,410	08/18/2000	Alice Mary O'Donnell-Kiely		7256

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7590

05/08/2007

EXAMINER

CHAWLA, JYOTI

ART UNIT	PAPER NUMBER
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1761

MAIL DATE	DELIVERY MODE
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05/08/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	09/641,410	O'DONNELL-KIELY, ALICE MARY	
	Examiner	Art Unit	
	Jyoti Chawla	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 December 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 229-258 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 229-258 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date: _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date: _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The amendments filed on December 6, 2006 have been entered. Claims 1-228 have been cancelled and claims 229-258 have been added. Claims 229-258 are pending and examined in the present office action.

Note: To expedite prosecution applicant is requested to furnish support for the subject matter recited in the new and amended claims. Furthermore, the applicant is requested to recite the claims such that the rejections made under 35 USC 112 in the previous office actions are corrected.

Claim Objections

Claim 234 is objected to because of the following informalities: Claim 234, line 6 has a step marked as 4 between steps c) and d). Appropriate correction is required.

Claim Rejections - 35 USC § 101

35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Claim 245 is rejected under 35 U.S.C. 101 because the claimed subject matter recites that the edible support can be a "two dimensional flattened support". It is not understood how a two dimensional figure, such as, a drawing on paper, could physically support a frozen comestible as recited in claim 63.

Claim Rejections - 35 USC § 112

Claims 229-258 are rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for "composite supports" (page 39) "candy bars and cookie bars" (Page 9), does not reasonably provide enablement for the "composite ingredient". The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the invention commensurate in scope with these claims. "Composite ingredient" as recited in 229-

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240, 249-250, and 253-258 does not have support in the original disclosure of the applicant. Similarly the term "discernible ingredient" as recited in claims 241-248, 251-252, does not have support in the original disclosure of the applicant.

Claim 236 is rejected under 35 U.S.C. 112, first paragraph, because the specification, while being enabling for "edible coating" does not reasonably provide enablement for the "composite ingredient" "composite ingredient is other than edible coating". The specification does not enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the invention commensurate in scope with these claims. "composite ingredient is other than edible coating" as recited in claim 236, does not have support in the original disclosure of the applicant.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 229-258 are rejected under 35 U.S.C. 112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 229-258 contain the transitional phrase "a composite ingredient(s)" and "composite member" which render the claim language indefinite as it is unclear as to what is encompassed by the term "a composite ingredient" or "a composite member". It is unclear whether these terms are two different ways of addressing the same idea. Does the term include an ingredient that goes in to make a composite such as flakes or raisins etc., or does the term include composite pieces as an ingredient in making the edible support, such as, chocolate chip cookies or frosted flakes etc. Further, it is unclear from claim 229 as recited whether the composite ingredient is edible (ice cream cone) or inedible (wood composite stick).

Terms "candy composite" and "composite candy" as recited make the claim language indefinite as it is unclear whether they are the same or different from each other. Neither

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the claims nor the specification define the term thus it is unclear for the purposes of prior art comparison whether "composite candy" or "composite candy support" are the same as "candy composite"

Claim 245 is indefinite for the recitation of "two-dimensional flattened support". It is not clear as to how would one make a two dimensional object. A graph or a chart is two-dimensional whereas all objects, however thin, will have three dimensions. Thus it is unclear as to how a two dimensional figure would provide support to the comestible as recited.

Claims 238, 241-248, and 258 is indefinite for the recitation of "The supported frozen comestible...comprising a plurality of ingredients for supporting the said frozen comestible comprising sugar..., wherein said plurality of ingredients comprises an indiscernible ingredient, a discernible ingredient, an individual ingredient or a composite ingredient". As recited the claims 238, 247 and 158 are indefinite as it is unclear as to what would constitute an indiscernible ingredient, discernible ingredient an individual ingredient or a composite ingredient among the ingredients used to support the frozen comestible. It is unclear how an ingredient, e.g., sugar would be categorized, i.e., would it be discernible because sugar sweetness is discernible by taste, or would it be an individual ingredient or would sugar be indiscernible ingredient as once mixed sugar may not be distinguishable by looking at the support. Thus the claim as recited is indefinite for the purposes of prior art comparison.

There are some relative terms which render the claims indefinite. These terms are not defined by the claims, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. Relative terms are:

- "sufficient surface area and adherence" and "sufficient surface area" as recited in claims 230, 242, and 254 is indefinite as it is unclear as to what standards of sufficiency are being employed to assess the adequacy of area and the adherence of the frozen confection to the support.

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- “utilitarian support” as recited in claims 230, 231, 242, 254, 255 is indefinite as utilitarian is a subjective term, e.g., a support that is considered utilitarian by one person may not be considered utilitarian by another.
- “widened surface” or “flattened surface” as recited in claims 231 and 255 are relative terms, which make the claim language indefinite, as it is unclear as to what standard of width or flatness is employed. Further it is unclear as to how much wider or flatter is the instantly claimed support as compared to the unspecified standard.
- “easier gripping surface” as recited in claims 234 and 244, is subjective as it is unclear as to what gripping standard is employed to determine that the support of the invention is easier to grip in relation to some undisclosed standard grip.
- “longer shelf life” or “longer shelf life in a store” as recited in claim 234, 244 is a subjective term as the term “longer shelf life” can have different meaning for different people. As recited, the shelf life of the frozen comestible is compared to some other support without providing the standard of shelf life that has been used for comparison purposes. Thus it is unclear as to what standard shelf life the invention as recited is being compared to.
- “extra adherence” as recited in claim 234, 244 is a subjective term as the term “extra adherence” can have different meaning for different people. As recited, the shelf life of the frozen comestible is compared to some other without providing the standard of adherence that has been used for comparison purposes. Thus it is unclear as to what standard adherence the invention as recited is being compared to.
- “suitable size and shape” as recited in claim 240, 248 is a relative term and it renders the claim indefinite. The suitability of a shape or size of an object is based on an individual’s evaluation, e.g., a suitable size and shape for an adult might be too big and thus unsuitable for a small child.
- “proper thickness” as recited in claim 240, 248, is subjective and renders the claim language indefinite, as recited. Since there is no disclosure of a standard

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for the proper thickness of the edible support for the frozen confection, therefore, an edible support that might be considered having a proper thickness by one person would be too thick or not thick enough for the other.

- “whimsically shaped supported frozen comestible” as recited in claim 239 is a subjective term and is unclear. Something that might appear whimsical to one may not be whimsical to another. Further it is unclear what the meets and bounds of the term “whimsical” are.

Claim 231 and 255 are indefinite for the recitation of “a vertically orientated support”. As recited it is unclear as to what is meant by the term “vertically orientated support” as vertical or horizontal orientation of the support would only be applicable for the method of making the frozen confection. The recitation of “orientation” is indefinite as it is unclear as to how the orientation of a support can be different in an unassembled support. Orientation of the edible composite support can be changed upon assembly of a comestible that is ready to be frozen, however, as recited the claims are addressed to a product. Thus the claim as recited is unclear.

The term “a handled support” as recited in claims 231, 255 is indefinite as it is unclear whether the term refers to a support that has one handle to hold the frozen comestible or a support that can be held or handled as opposed to a support that is capable of being handled.

Claim 231, 255 are indefinite for the recitation of “sandwiching support”. It is unclear whether the edible support is sandwiched between two other components or the support itself is a sandwich, such as, a wafer or sandwich cookie (e.g., Oreo) or the frozen comestible is sandwiched between two supports, i.e., an ice-cream sandwich.

Claims 234, 240, 244 and 248 as recited are indefinite as the preamble of the claim is directed to “the supported frozen comestible wherein said moisture barrier comprises a) –h)”, where the options have been written as use of or as active method steps, such as, “gluing a mess guard ...; affixing a plurality of edible supports...; coating the layer or a portion of the composite ingredient” etc. For examination purposes the claim language

would be considered to include only the components and not the method of use of the included components in order to make the frozen confection.

Claims 234, 240, 244, and 248 are further rejected under 35 U.S.C. 112, second paragraph, as being incomplete for omitting essential steps, such omission amounting to a gap between the steps. See MPEP § 2172.01. The omitted steps are: the method of preventing transfer of moisture, method of adding texture, method of providing easier grip, method of affixing plurality of edible supports, method of gluing the mess guard and monitoring the amount of moisture, shortening, sugar, air, air bubbles, and a proper shape etc.

Claim 235 is indefinite for the recitation of broad limitation followed by a narrow limitation. Claim 235 recites, "wherein said composite ingredient comprises enrobed or dipped ingredient, wherein said composite ingredient comprises a whipped nougat dipped in a chocolate coating" It is unclear whether the composite support has nougat dipped in chocolate and another enrobed ingredient. It is unclear whether nougat dipped in chocolate qualifies as the enrobed composite ingredient or is other than the enrobed or dipped composite ingredient. It is also unclear whether the nougat dipped in chocolate is required or an optional limitation for the edible support as recited.

Claims 240 and 248 are indefinite for the recitation of "suitable amount of moisture, shortening, sugar, air, and air bubbles in a composite ingredient" as it is unclear as to what standards of adequacy of moisture, shortening or air etc., are being employed to determine the suitability of the above mentioned characteristics, as recited. Further "suitable moisture" and other similar terms are subjective as a support with suitable moisture to one might appear to be too dry or too soft to another.

Claim 242 is indefinite for the recitation of "to dependably support the frozen comestible". It is unclear as to what standard of dependability is being employed and what is the recited support being compared to for its dependability.

Claims 243, 247 and 256 are indefinite for the recitation of "Particles thereof", "mixed particles thereof", "coated particles thereof" as it is unclear as to which discernible ingredient the terms "Particles thereof", "mixed particles thereof", "coated particles thereof" refer to, as recited in the claim.

Claim 239 recites the limitation "candy supported frozen comestible" as recited in claim 229, line 1. There is insufficient antecedent basis for this limitation in the claim as there is no candy recited in the independent claim 229.

Claim 239 recites "The candy ...comprising an edible member on said composite ingredient support, wherein said edible member comprises a lollipop..., an inedible portion comprising wood, plastic..., wherein said edible member comprises licorice..., said composite ingredient further comprises a plurality of edible members, wherein said composite ingredient support comprises an edible member, an inedible member or a composite member". It is unclear as to whether the "inedible portion" and "inedible member" are being used interchangeably or they are two separate terms. It is also unclear as to what comprises the edible member because as recited the edible member has been recited in various parts of the claim, which makes the claim language unclear, as recited. Further claim 239 has improper Markush-type language, where the applicant uses the term "comprises" or "comprising" without consistently using the word "or" to separate the choices given in the part of the claim describing the choices listed after comprising. For the purposes of prior art comparison claim 239 will be considered as describing the composite support of a frozen comestible, where the support comprises an edible member, an inedible member or a composite member.

Claims 253-258 are indefinite for the recitation of "a composite ingredient for subsequently supporting a frozen comestible" as it is unclear as to what is encompassed by the term "subsequently supporting" and it is further unclear whether the product or the process as to what is the recited subject matter is subsequent to.

Claim 241, recites of an "edible composite support". Claim 246, which depends upon claim 241, recites "frozen comestible of claim 241, further comprising a composite ingredient", which fails to further limit the invention as claimed in claim 241. Similarly claims 250 and 252 fail to further limit the invention from claims 249 and claim 251, respectively.

Double Patenting

Statutory Provisional Double Patenting

A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

Independent claims 241, 251 of 09/641410 is provisionally rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 30 of copending Application No.10/167,812. This is a provisional double patenting rejection since the conflicting claims have not in fact been patented.

Nonstatutory Provisional Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422

F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 229-258 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 21-29, 31-40, of copending Application No. 10/167812. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 229-258 of the present invention are drawn to a frozen comestible with a composite support with composite ingredient, as is the case with claims 21-40 of Application 10/167812.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 229-258 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 153-194 of copending Application No. 10/163,209. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 229-258 of the present invention are drawn to a frozen comestible with a composite support, wherein Application 10/163209 claims a frozen comestible supported by an edible support with a composite ingredient.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 102

Claims 229-258 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

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The references and rejection are incorporated herein and as cited in the previous office actions mailed on or before June 1, 2006.

Musher teaches ice cream (frozen comestible) on an edible support structure made of stick, which can be inedible, however, the stick can be made completely edible. The edible stick as taught by Musher is attached to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47). Thus Musher teaches of a frozen comestible, and a composite ingredient, for supporting the frozen comestible as recited in claims 229, 232- 233, 246, 249-250, 253-257. The end of the stick may include a lollipop (as recited in claim 239) that is also connected structure pieces (Page 5: column 1, lines 26-33 and 54-65), which may include items such as nuts or even a plurality of candy pieces (page 3: Column 2, lines 14-21 and Page 5: Column 2, lines 24-35), and the lollipop and structure pieces i.e., before forming into a three dimensional composite support (Page 4: column 1, line 72 to Column 2, line 23) may be coated in hard fat (Enrobed or dipped ingredient), which prevents the transfer of moisture and improve the adhesion or grip of the frozen comestible (Page 3: Column 2 lines Page 5: Column 1 , lines 65 to Column 2, line 2), as recited in claims 234 and 244. Musher also teaches that the finished product or the composite formed support can be coated with chocolate or sprinkled with other flavoring material, i.e., enrobed or dipped ingredient (Page 3: Column 2, lines 25-30), as recited in claims 235 to 237.

The composite support as taught by Musher has at least two discernable (i.e. perceptible) edible members (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), wherein one portion extends into the ice cream and the other portion extends out of the ice cream for holding the frozen confection vertically (i.e., Musher teaches of a vertically orientated utilitarian support) (See figures 1-6), as recited in claims 230, 231, 241-242, 251-252, 254.

The composite support as taught by Musher has plurality of individual ingredients, which can be discernible (i.e. perceptible), such as the cereal flakes, candy flakes, ribbons,

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grains etc., (Page 1: Column 1, lines 37-46 and Column 2 lines 40-55) also (Page 4: column 1, line 72 to Column 2, line 23), as recited in claims 238 and 247. Musher further teaches the support structure for the frozen confection which includes an edible stick or lollipop, where the composite support made by attaching the stick (which may be completely edible) to the cereal flakes, sugar, candy flakes or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47), as recited in claims 243 and 258. The discernible ingredients taught in the support structure as taught by Musher comprise a discernible difference, e.g., flakes and hardened candy pieces provide two different taste and texture, as recited in claim 245.

Musher further teaches that the structure pieces around the lollipop, which include candy, can be placed concentrically (i.e. a circle around the lollipop) or maneuvered in some other manner on the support to improve the strength of the support, (page 5: Column 1, lines 45-54 and Column 2, lines 24-35), i.e., musher teaches of supported frozen comestible having means for inhibiting the breakage, as recited in claims 240 and 248.

Furthermore, Musher teaches a plurality of voids in the overall structure (i.e. note the spaces in Figure 6 between the structure pieces and lollipop (Page 2: Column 2, lines 20-25; Page 3: Column 1 line 70-Column 2 line 5) Also see Page 6: Column 1, lines 4-70; Page 2, Column 2, line 4 to Page 3, Column 1, line 60 and figures 1-6).

Regarding applicant's argument that the composite of flakes, candy, grains, sugars and fats are not ingredients of the support (Remarks, pages 12 and 13), applicant is referred to Musher Pages 1-5, and specifically to pages 3:column 2, lines 45 to page 4 column 2, line 75, where the reference teaches that the unit composite structure is dried to make it sufficiently firm so that it retains the durability when the fluid or plastic material for the frozen confection is applied or poured. Furthermore, applicant is referred to Figures 1-6 where Musher teaches various ways in which the support for ice cream can be made. Therefore the edible structure of cereal, flakes, ribbons, sugar and edible

coating (i.e., chocolate etc.) as taught by Musher is a composite edible support for ice-cream, as instantly claimed.

Response to Arguments

Applicant's arguments dated December 6, 2006 have been fully considered, but they are not persuasive.

I) Regarding applicant's arguments regarding 102(b) rejection as being anticipated by Musher, Please refer to the reasons stated in the office action mailed October 7, 2005 and June 1, 2006 along with the office action above.

Regarding the argument that Musher reference does not teach a composite support and only teaches a frozen confection with flakes in the body of the confection (Remarks pages 12-13), the applicant is referred to the rejection above.

Regarding applicant's argument that the Musher's external flakes cannot "enter into" the mixture of baked support but remain separated by a coating, which can be eliminated, the applicant is referred to the rejection above. The applicant is further reminded that the baked support and the flakes and nuts etc., make the composite support structure which comprises voids where the ice-cream mixture is poured and frozen. Thus applicant's arguments regarding the composite structure taught by Musher does not comprise a composite support is not persuasive.

Regarding applicant's argument on page 12, "Musher's voids are in the flakes structure not in the support", please refer to page 4 of Musher, where Musher teaches molding of stick and other flake material into a support structure for the frozen confection and forming the structure and coating it prior to addition of liquid and freezing steps. Thus making the support having the voids into which the ice cream material flows.

Regarding applicant's argument that the coating of support structure taught by Musher can be eliminated as in figure 3 of Musher, the applicant is referred to rejection above and Musher, pages 1-5, where the reference teaches that the support structure can be coated. Thus the reference teaches of coating in the edible composite support for a frozen comestible as instantly claimed.

Musher teaches that there is a stick attached at the end of the composite which can be a candy or lollipop with a non-edible stick or the entire stick can be edible (Page 5: Column 2, lines 40-60). The reference also teaches setting the stick shape into the rest of the composite using edible glue (sugar, fats etc.), thus clarifying that the entire composite structure is the support for the frozen confection. Therefore, the composite molded structure with a stick or handle as taught by Musher is an edible composite support structure which is made before so that either the ice cream can be poured over or the support is dipped in fluid ice cream material, as instantly claimed by the applicant. Furthermore, Dictionary defines composite as "made up of distinct components", in light of the definition, Musher teaches the composite support (Page 1: Column 1, lines 37-46 and Column 2, lines 50-55) with two or more ingredients (Pages 1-3) and an additional coating as instantly claimed.

In response to applicants argument regarding the stick, the stick taught by Musher (page 5: Column 2 and Page 6: Column 1) is only a part of the entire support structure and the whole unit can be made and molded all together to make an edible support with or without the lollipop with discernible parts and coating and voids in one step process or as a multi step process (Page 4: Column 1, line 1 to Page 4: column 2, line 45). Since composite is a made up of distinct parts, which are separately whole or parts of other compositions, the support taught by Musher fits the definition.

Regarding the ingredients of the dough stick taught by Musher as *indiscernible* ingredients (Remarks, page 13, lines 1-4), the applicant is reminded that claims 238 and 247 recite that the plurality of ingredients in the support can be *indiscernible*. Thus the Musher reference teaches of the invention as instantly claimed. Regarding applicant's statements that the ingredients taught by Musher are not discernible, applicant is referred to the currently recited claims where the applicant claims non-discernible ingredients as well as discernible ones (Claims 238, 247 and 258). Furthermore the applicant merely states that the ingredients of the composite support taught by Musher are not discernible without any specific reasons for the statement. As discussed above the cereal flakes with candy flakes or ribbons etc put together with fats and sugars would comprise a composite where the ingredients are discernible. Thus, the claimed

invention is anticipated by Musher reference, absent any clear and convincing evidence and/or arguments to the contrary. Further, applicant states that the ingredients are not discernible without stating the reason for the same. Also Multiple flakes put together using sugars and raisins and sugar ribbons make a support for the frozen confection that is composite, has discernible ingredients, some indiscernible ingredients and plurality of ingredients as instantly claimed.

Applicant's argument that Musher teaches that the candy can be substituted by an inedible stick or other optional features taught by Musher mean that Musher does not teach the composite support of the invention. In response the applicant is reminded that just because Musher teaches certain features as optional does not mean that those optional features are definitely eliminated. Thus the reference does teach the elements as claimed and applicant's arguments are not persuasive.

II) Regarding applicant's argument about Firmin, where the applicant argues that certain ingredients in the edible support as taught by Firmin can be eliminated (Remarks, page 13) the applicant is reminded that since the reference teaches that certain ingredients are optional or can be eliminated, is not a definitive statement indicating that the optional ingredients would never be part of the support as taught.

III) Applicant's argument that references used in 103 (a) rejections, have not being able to show all the features as instantly claimed is not persuasive. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Thus applicant's arguments have been fully considered and have not been found persuasive and claims 229 to 258 are rejected for reasons of record.

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Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jyoti Chawla whose telephone number is (571) 272-8212. The examiner can normally be reached on 8:00 am to 4:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Jyoti Chawla
Examiner
Art Unit 1761

Steve Weinstein
STEVE WEINSTEIN
PRIMARY EXAMINER 3/5/07
for
M. Cano